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THE NEW YORK WORKMEN'S COMPENSATION ACT AS DUE PROCESS OF LAW. — In 1910 the Legislature of the State of New York passed a statute [1] modeled upon the English Workmen's Compensation Act of 1897. It provides that for all personal injuries to workmen in the course of eight specified employments, declared to be "especially dangerous," the employers shall be liable for damages, unless caused at least in part by the serious or willful misconduct of the injured workman.[2] Recently

[1] N. Y., LAWS OF 1910, ch. 674, §§ 215–219 g.

[2] The most important sections are:

"§ 217. Basis of Liability. — If, in the course of any of the employments above described, personal injury by accident arising out of and in the course of the employment after this article takes effect is caused to any workman employed therein, in whole or in part, or the damage or injury caused thereby is in whole or part contributed to by

"a. A necessary risk or danger of the employment or one inherent in the nature thereof; or

"b. Failure of the employer of such workmen or any of his or its officers, agents or employees to exercise due care, or to comply with any law affecting such employment; then such employer shall, subject as hereinafter mentioned, be liable to pay compensation at the rates set out in section two hundred and nineteen-a of this title; . . . provided that the employer shall not be liable in respect of any injury to the workman which is caused in whole or in part by the serious and willful misconduct of the workman.

"§ 218. Rights of Action not affected. — The right of action for damages caused by any such injury, at common law or under any statute in force on January one, nineteen hundred and ten, shall not be affected by this article, and every existing right of action for negligence or to recover damages for injuries resulting in death is continued, and nothing in this article shall be construed as limiting such right of action, but in case the injured workman, or in event of his death his executor or adminis-

the Court of Appeals, reversing the decisions of the Appellate Division [3] and Special Term of the Supreme Court [4] unanimously held the statute unconstitutional. *Ives* v. *South Buffalo Ry. Co.*, 201 N. Y. 271. All the members of the court agreed that the classification of employments is a proper one, and that it is competent for the Legislature to abolish the fellow-servant rule and the defense of contributory negligence.[5] The decision rests on the ground that the provision for liability in the absence of negligence is not justified under the police power, and amounts to a deprivation of property without due process of law. Although in general the New York court has perhaps shown a greater tendency to overthrow statutes than the United States Supreme Court,[6] it has never been suggested that due process has a different meaning in the State Constitution than in the Fourteenth Amendment.[7] It is submitted that the act may be supported either (I) independently of the police power or (II) as an exercise of it.

I. The phrase "due process of law" can be given no definition which will settle all cases, and little that is helpful in determining the principal case can be culled from the general discussions. The provision undoubtedly applies to acts of the legislature as well as the judicial and the administrative departments; [8] and it limits legislation as to sub-

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trator, shall avail himself of this article, . . . he shall be barred from recovery . . . at common law or under any other statute on account of the same injury after this article takes effect. In case after such injury the workman, or in the event of his death his executor or administrator, shall commence any action at common law or under any statute other than this article against the employer therefor he shall be barred from all benefit of this article in regard thereto.

"§ 219 a. Scale of Compensation. — The amount of compensation shall be in case death results from injury:

"a. If the workman leaves a widow or next of kin at the time of his death wholly dependent on his earnings, a sum equal to twelve hundred times the daily earnings of such workman. . .

"2. Where total or partial incapacity for work at any gainful employment results to the workman from the injury, a weekly payment commencing at the end of the second week after the injury and continuing during such incapacity, subject as herein provided, equal to fifty per centum of his average weekly earnings when at work . . . *In no event shall any compensation paid under this article exceed the damage suffered, nor shall any weekly payment payable under this article in any event exceed ten dollars a week or extend over more than eight years from the date of the accident.*

[3] Ives *v.* South Buffalo Ry. Co., 140 N. Y. App. Div. 921.

[4] 68 N. Y. Misc. 643.

[5] The court declined to decide whether the provision of a fixed rate of compensation violated the stipulation in the State Constitution for trial by jury. This question is not in the scope of this note. This provision does not violate the Due Process provision. See Commissioners of Champaign Co. *v.* Church, 62 Oh. St. 318; Carroll *v.* Missouri Pacific Ry. Co., 88 Mo. 239.

[6] *Cf.* Wright *v.* Hart, 182 N. Y. 330, with Lemieux *v.* Young, 211 U. S. 489 (statutes regulating sales of entire stocks in trade of merchants); Westervelt *v.* Gregg, 12 N. Y. 202, with Baker's Exrs. *v.* Kilgore, 145 U. S. 487 (statutes cutting off husband's rights in wife's property); Ives *v.* South Buffalo Ry. Co., *supra*, with Chicago, Rock Island, & Pacific Ry. Co. *v.* Zernecke, 183 U. S. 582 (statute making railroads insurers of passengers). But in Lochner *v.* New York, 198 U. S. 45, the Supreme Court reversed the holding of the New York Court of Appeals that a statute limiting bakers to a sixty-hour week was constitutional.

[7] Both in the principal case and in Wright *v.* Hart, 182 N. Y. 330, Werner, J., also treats the Due Process clauses in the State and Federal Constitutions alike.

[8] See Chicago, Burlington & Quincy R. Co. *v.* Chicago, 166 U. S. 226, 233; Taylor *v.* Porter, 4 Hill (N. Y.), 140, 145; COOLEY, CONSTITUTIONAL LIMITATIONS, 7 ed. 503.

stantive rights [9] as well as to adjective law. It requires, probably, that the same general system of law which existed in the states before the Constitution shall continue, and that the "fundamental" or "vested" rights which that system has recognized shall not be infringed.[10] The difficulty comes in determining what are such rights. But no person has any property or vested right in any one rule of the common law unless it is a fundamental rule.[11] Fifty years ago a state judge pointed out that the phrase did not mean that legislation as to property must stop at the precise point at which it stood when the Constitution was adopted,[12] and only this year Holmes, J., said that the broad words must not be pressed to "a drily logical extreme." [13]

The common law did not deprive a person of property except for events caused by the operation of instrumentalities which he employed or with which he had some responsible connection. But, it is submitted, that there is no truly fundamental rule of the common law narrower than this. In a majority of cases, A is not liable for damage done to B unless A is "at fault," by which is meant that he caused the damage intentionally or negligently. But originally a man was liable for all damage which he brought about; the law of negligence is of comparatively recent development and it does not embrace all torts.[14] Torts may be divided into three classes: (1) Those for which the defendant can be held only if he committed the damaging act intentionally, *e. g.*, deceit and malicious prosecution. (2) Those for which the defendant can be held if negligent in committing the act. (3) Those for which the defendant can be held where the act was not intended by him and where he was not negligent, but which was due to an instrumentality (not necessarily human) which he employed. Examples of the last are the liability for damage done by blasting,[15] of the keeper of a ferocious animal,[16] of a master for a servant, and of a ship for the care of disabled seamen.[17] All of these have been recognized in New York. Consequently the Legislature in passing the Workmen's Compensation Act merely declared, in effect, that for physical damage done to these workmen the requisites for the recovery of damages should be those of class 3 above, instead of those of class 2. Legislation changing the requisites for recovery for a tort has often been upheld. The abolition of the fellow-servant rule has repeatedly been held constitutional.[18] Almost every state in the Union has a statute giving an action for death by wrongful act, and this has never been declared invalid.[19] Other stat-

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[9] See 58 Pa. L. Rev. 191.

[10] This is the common statement. See Hurtado *v.* California, 110 U. S. 516, 536; East Kingston *v.* Towle, 48 N. H. 57, 61.

[11] See Munn *v.* Illinois, 94 U. S. 113, 134 (Waite, C. J.).

[12] Ames, C. J., in State *v.* Keeran, 5 R. I. 497, 506. For a history of due process before the Civil War, see 24 HARV. L. REV. 366, 460.

[13] See Noble State Bank *v.* Haskell, 219 U. S. 104, 110.

[14] See historical articles by Prof. Wigmore in 7 HARV. L. REV. 315, 383, 441; 8 *id.* 200, 377; also HOLMES, COMMON LAW, 79–161.

[15] Sullivan *v.* Dunham, 161 N. Y. 290.

[16] Muller *v.* McKesson, 73 N. Y. 195.

[17] See Scarff *v.* Metcalf, 107 N. Y. 211, 216.

[18] Missouri Ry. Co. *v.* Mackey, 127 U. S. 205; Powell *v.* Sherwood, 162 Mo. 605.

[19] See Carroll *v.* Missouri Pacific Ry. Co., 88 Mo. 239; Louisville Safety-Vault &

utes which have been upheld are those making municipalities liable for all damage done by mobs within their borders;[20] making railroads liable for all fires communicated from their engines;[21] making a person driving animals over a highway liable for all damage done by them to the highway banks;[22] making the owner of a vehicle liable for all damage done by its collisions;[23] and making railroads liable for all physical injuries suffered by passengers on its trains, unless due to the criminal negligence of the passenger.[24] Consequently it would seem to be a fair conclusion that the law of negligence is not such a fundamental principle of our system of jurisprudence as to be rendered inviolate by the due process clause.

The basis of the decision of the New York Court of Appeals is found in the following statement: "When our Constitutions were adopted it was the law of the land that no man who was without fault or negligence could be held liable in damages for injuries sustained by another." [25] The examples of absolute liability above are quite inconsistent with this. The court dismisses the analogy of liability of the master for acts of his servant by saying that it is not an example of liability without fault, and that "the whole theory is expressed in the maxim *qui facit per alium facit per se*." [26] But that maxim is not broad enough to cover all liability for acts of servants, much of which rests on the totally distinct doctrine of *respondeat superior*, which is based on the policy that a person for whose benefit an act is done should bear the burden of its unfortunate consequences.[27] The liability of a ship in admiralty for care of a disabled seaman the court distinguishes on the ground that he is "a co-adventurer with the master" and shares in marine risks "which do not affect workmen on land." [28] But why is it different in principle to force the loss of sea accidents on the employer than to force on him the loss of machinery accidents? The court does not mention absolute liability for ferocious animals or for such acts as blasting. Its efforts to reconcile the cases upholding statutes similar to the New York act are not wholly convincing,[29] and the cases on which the court relies do not seem wholly to control the point at issue.[30] Werner, J., argues

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Trust Co. *v.* Louisville & N. R. Co., 17 S. W. 567 (Ky.); TIFFANY, DEATH BY WRONGFUL ACT, § 31.

[20] Darlington *v.* Mayor of New York, 31 N. Y. 164; Commissioners of Champaign Co. *v.* Church, 62 Oh. St. 318.

[21] St. Louis & San Francisco Ry. *v.* Mathews, 165 U. S. 1.

[22] Jones *v.* Brim, 165 U. S. 180.

[23] Levick *v.* Norton, 51 Conn. 461. Hare seems to doubt this case. See 2 HARE, CONSTITUTIONAL LAW, 882, 883.

[24] Chicago, Rock Island, & Pacific Ry. Co. *v.* Zernecke, 183 U. S. 582, affirming 59 Neb. 689; Clark *v.* Russell, 97 Fed. 900 (C. C. A.).

[25] 201 N. Y. 293.

[26] 201 N. Y. 311.

[27] See STORY, AGENCY, 9 ed., 518, n., 520–523.

[28] 201 N. Y. 311.

[29] Some of them are not mentioned.

[30] The cases relied on are State *v.* Divine, 98 N. C. 778; Ohio & Mississippi Ry. Co. *v.* Lackey, 78 Ill. 55; and several cases upsetting statutes making railroads liable for all animals killed by them (cited, 201 N. Y. 298. A fuller collection of such cases is that in 8 CYC. 1100). All these seem to go so far as to impose liability for events with which defendants might have no responsible connection. Possibly the animal statutes are not distinguishable, but most of them arose in the newer states, involved very small amounts, and apparently were not strenuously contested by the plaintiffs. It is noteworthy that a passage in the second edition of Black on which the court relies

that if the present statute is valid so would be one establishing socialism. Without discussing the validity of such a radical act, it seems sufficient to point out that it is easily distinguishable from the present one in that the former would be taking property for no event with which its owner has responsible connection.

II. It has never been doubted that the police power of the states survived the Fourteenth Amendment and all other Due Process provisions. The only effect of a Due Process clause on the police power is that it forbids its being exercised to produce arbitrary discrimination.[31] A New York statute involved in *Bertholf* v. *O'Reilly* [32] provided that any landlord who knowingly leased his building for saloon purposes should be liable for loss resulting from intoxication caused by the sale of liquor by his lessee. The sale of liquor, however, was not prohibited. The Court of Appeals upheld this statute as a proper exercise of the police power. Certainly this statute goes as far in imposing liability where there is no fault or direct causal connection as the Workmen's Compensation Act, and if the latter can be brought within the police power it would seem to be constitutional.

But the limits of the police power have always been shadowy.[33] According to the narrowest definition, it comprises legislation regarding public health, safety and morals.[34] Werner, J., stated that the Workmen's Compensation Act "does nothing to conserve the health, safety or morals of the employees" [35] and held that it did not come under the police power. Although it is unquestionably within the province of the court to decide whether a statute does concern health, safety and morals,[36] this is a mere question of fact, and the finding of the New York court on this point seems not free from doubt. After a careful study of industrial accidents for a year in Allegheny County, Pennsylvania, called the "Pittsburgh Survey," the author of an elaborate report argues that the effect of imposing absolute liability on employers would force them to take further steps to prevent accident and that fewer injuries would occur.[37] The same argument was advanced in the House of Lords when the Workmen's Compensation Act of 1897 was passed,[38] and it seems to be borne out by the results in England.[39] It seems that the New York act would have this same effect.[40]

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does not appear in his third edition, the temper of which strongly indicates that the author would uphold the New York statute. See BLACK, CONSTITUTIONAL LAW, 2 ed., 351; 3 ed., Preface, and 408.

[31] See Barbier *v.* Connolly, 113 U. S. 27, 31, 32.

[32] 74 N. Y. 509.

[33] See COOLEY, CONSTITUTIONAL LIMITATIONS, 7 ed., 829–831; GUTHRIE, FOURTEENTH AMENDMENT, 73, 74.

[34] See Colon *v.* Lisk, 153 N. Y. 188, 197; Health Dept. *v.* Rector, 145 N. Y. 32.

[35] 201 N. Y. 302.

[36] See Lawton *v.* Steele, 152 U. S. 133, 137; People *v.* Hawkins, 157 N. Y. 1, 7.

[37] EASTMAN, WORK ACCIDENTS AND THE LAW, 216–220. For estimates of the vast number of industrial accidents in the country as a whole, and various specific parts, see 7 Mich. L. Rev. 461; BULLETIN ON INDUSTRIAL ACCIDENTS, STATE OF MINN., No. 1, Oct., 1909, pp. 12, 15.

[38] See The Outlook, vol. 97, p. 955 (April 29, 1911).

[39] See ANNUAL REPORT FOR 1907, MASS. BUREAU OF STATISTICS OF LABOR, Part II, pp. 225–226, quoting report of English Commission; OLIVER, DANGEROUS TRADES, 9.

[40] The New York Court of Appeals has said that the imposition of absolute liability tends to prevent accidents. See Sullivan *v.* Dunham, 161 N. Y. 290, 300; Darlington

But even if the above line of argument is not sound, the statute may still be brought under the police power. That power is not limited merely to health, safety and morals. Distinctly outside of this classification are, for example, the regulation of businesses affected by a public use,[41] and statutes aimed at the development of natural resources.[42] A less conservative view has been often stated that the police power extends to all regulations in the interests of great social and economic needs.[43] That the New York act is in the interest of a great social and economic need seems certain. Such legislation has been advocated by economists,[44] it has been adopted in almost every other civilized country,[45] it is being contemplated in several states of the United States,[46] and the report of the very commission which recommended the New York Statute showed that "our own system of dealing with industrial accidents is economically, morally, and legally unsound." [47]

One cannot but conjecture that the underlying ground for the decision is the conviction of the court that paternalism is contrary to our system of jurisprudence. The New York Court of Appeals has openly assailed paternalism,[48] and traces of this antagonism have cropped out in its decisions from time to time.[49] A contrary notion seems to be entertained by the Supreme Court of the United States [50] and by several careful students of our jurisprudence; [51] and it seems hardly likely that New York's narrow view of due process will find support in other jurisdictions.

THE NATURE OF THE RESPECTIVE INTERESTS OF HUSBAND AND WIFE IN COMMUNITY PROPERTY. — The community system, by which property rights of husband and wife are regulated in no inconsiderable por-

v. Mayor of New York, 31 N. Y. 164, 187. See also Indianapolis Union R. Co. *v.* Houlihan, 157 Ind. 494, 501.

[41] Munn *v.* Illinois, 94 U. S. 113.

[42] Manigault *v.* Springs, 199 U. S. 473; Head *v.* Amoskeag Manufacturing Co., 113 U. S. 9.

[43] In Noble State Bank *v.* Haskell, 219 U. S. 104, 111, Holmes, J., said, "In a general way, the police power extends to all the great public needs." See also Lawton *v.* Steele, 152 U. S. 133, 136, quoted by WATSON, THE CONSTITUTION, 603, "Beyond this, however, the State may interfere whenever the public interests demand it." McGehee in his treatise on DUE PROCESS OF LAW, has under "Police Power" a sub-heading, "Regulation in the Interest of Economic Prosperity and General Welfare" (p. 357), and says (p. 301) that the police power embraces "all legislation looking to the well being of society in its economic and intellectual aspects."

And dangerous employments have been several times mentioned as especially subject to the police power. See Indianapolis Union R. Co. *v.* Houlihan, 157 Ind. 494, 501; Louisville Safety-Vault & Trust Co. *v.* Louisville & N. R. Co., 17 S. W. 567, 569 (Ky.)

[44] See, for example, GILMAN, METHODS OF INDUSTRIAL PEACE, 234; DOWNEY, HISTORY OF LABOR LEGISLATION IN IOWA, 182–185.

[45] A list compiled in 1909 names twenty-three countries which have some form of absolute protection. See BULLETIN ON INDUSTRIAL ACCIDENTS, STATE OF MINN., No. 1, Oct., 1909, p. 5.

[46] See *id.*, pp. 5, 12–13.

[47] Werner, J., in the principal case, 201 N. Y. 287.

[48] See People *v.* Gillson, 109 N. Y. 389, 405.

[49] See People *v.* Hawkins, 157 N. Y. 1; Matter of Jacobs, 98 N. Y. 98.

[50] See Engle *v.* O'Malley, 219 U. S. 128.

[51] See BLACK, CONSTITUTIONAL LAW, Preface to 3 ed.; MCGEHEE, DUE PROCESS OF LAW, 362; Article by Professor Pound, 24 HARV. L. REV. 591.